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No. 92-780

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

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NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,
*Petitioners,*

v.

JOSEPH SCHEIDLER, *et al.*,
*Respondents.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

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## BRIEF IN OPPOSITION OF RESPONDENTS RANDALL A. TERRY, PROJECT LIFE, AND OPERATION RESCUE

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## QUESTIONS PRESENTED

1. Whether the federal RICO statute, 18 U.S.C. § 1962 (c) and (d), applies to anti-abortion activities undertaken with a complete absence of any economic purpose?

2. Whether anti-abortion "rescues" and protest activities constitute "extortion" under the Hobbs Act, 18 U.S.C. § 1951?

3. Whether the court of appeals correctly affirmed the dismissal of petitioners' antitrust claim? (*See* Brief of Respondents John P. Ryan and Pro-Life Direct Action League, Inc. in Opposition, and Brief in Opposition of Respondents Joseph Scheidler, et al., for statement of the specific issues presented with respect to petitioners' antitrust claims.)

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | iv |
| INTRODUCTION | 1 |
| STATEMENT OF CASE | 2 |
| 1. Statement of Facts | 2 |
| 2. Course of Proceedings | 5 |
| REASONS FOR DENYING THE WRIT | 6 |
| I. PETITIONERS' UNSOUND AND SURREAL THEORY OF THE CASE DOES NOT MERIT REVIEW | 6 |
| II. THERE IS NO CONFLICT IN THE CIRCUITS | 8 |
| III. THE COURT BELOW CORRECTLY DETERMINED THAT THE RICO STATUTE REQUIRES AT LEAST SOME ECONOMIC PURPOSE | 10 |
| IV. AN ALTERNATIVE GROUND FULLY SUPPORTS THE JUDGMENT BELOW: THE ACTS ALLEGED DO NOT CONSTITUTE PREDICATE EXTORTION | 14 |
| A. No Allegation of "Obtaining" | 18 |
| B. No Allegation of "Property" | 18 |
| C. No Allegation of "Consent" | 20 |
| D. No Allegation of "Force, Violence, or Fear" | 21 |
| CONCLUSION | 24 |
| APPENDIX: | |
| Selected excerpts of Ex. B to Plaintiffs' Responses to Terry's First Interrogatories to All Plaintiffs (July 16, 1990) | 1a |

## TABLE OF AUTHORITIES


| *Cases* | Page |
|---|---|
| *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989) | 11 |
| *McCormick v. United States*, 111 S. Ct. 1807 (1991) | 22 |
| *McNally v. United States*, 483 U.S. 350 (1987) | 19, 20 |
| *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) | 13, 21 |
| *National Organization for Women v. Scheidler*, 765 F. Supp. 937 (N.D. Ill. 1991) | 5, 10 |
| *National Organization for Women v. Scheidler*, 968 F.2d 612 (7th Cir. 1992) | 5, 13, 14 |
| *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989) | 9, 10, 22 |
| *Town of West Hartford v. Operation Rescue*, 915 F.2d 92 (2d Cir. 1990) | 21 |
| *United States v. Bagaric*, 706 F.2d 42 (2d Cir.), *cert. denied*, 464 U.S. 917 (1983) | 8, 9, 10, 12, 13 |
| *United States v. Bass*, 404 U.S. 336 (1971) | 23 |
| *United States v. Caldes*, 457 F.2d 74 (9th Cir. 1972) | 22, 23 |
| *United States v. Clark*, 646 F.2d 1259 (8th Cir. 1981) | 9 |
| *United States v. Culbert*, 435 U.S. 371 (1978) | 22 |
| *United States v. DeMet*, 486 F.2d 816 (7th Cir. 1973) | 18 |
| *United States v. Ellison*, 793 F.2d 942 (8th Cir.), *cert. denied*, 479 U.S. 937 (1986) | 9 |
| *United States v. Enmons*, 410 U.S. 396 (1973) | 22, 23 |
| *United States v. Ferguson*, 758 F.2d 843 (2d Cir.), *cert. denied*, 474 U.S. 1023 (1985) | 8, 9, 10, 12 |
| *United States v. Flynn*, 852 F.2d 1045 (8th Cir.), *cert. denied*, 488 U.S. 974 (1988) | 9, 10, 11 |
| *United States v. Green*, 350 U.S. 415 (1956) | 18 |
| *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983) | 8, *passim* |
| *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818) | 12 |

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *United States v. Staszcuk*, 517 F.2d 53 (7th Cir.) (en banc), *cert. denied*, 423 U.S. 837 (1975) | 23 |
| *Statutes* | |
| 15 U.S.C. § 1 | 1 |
| 15 U.S.C. § 26 | 1 |
| 18 U.S.C. § 1341 | 19 |
| 18 U.S.C. § 1951 | 15, 21, 23 |
| 18 U.S.C. § 1961(1) | 15 |
| 18 U.S.C. § 1961(4) | 10 |
| 18 U.S.C. § 1961(5) | 14 |
| 18 U.S.C. § 1962(a) | 1, 11, 12, 13, 14 |
| 18 U.S.C. § 1962(b) | 11, 12, 13, 14 |
| 18 U.S.C. § 1962(c) | 1, 10, 13, 14 |
| 18 U.S.C. § 1962(d) | 1 |
| 28 U.S.C. § 455(b)(1) | 7 |
| *Other Authorities* | |
| 91 Cong. Rec. 11912 (1945) | 22 |
| Rule 15(a), Fed. R. Civ. P. | 3 |
| Webster's Third New International Dictionary (1981) | 11 |

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### INTRODUCTION

Petitioners initiated this action for declaratory and injunctive relief and damages by invoking federal antitrust law (the Clayton Act, 15 U.S.C. § 26, and the Sherman Antitrust Act, 15 U.S.C. § 1), the Racketeer Influenced and Corrupt Organizations (RICO) Act (18 U.S.C. §§ 1962(c) and (d)),[1] and pendent state law.[2]

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[1] Petitioners initially sought relief under 18 U.S.C. § 1962(a) as well. The courts below rejected this claim, and petitioners have not sought review of those rulings in this Court.

[2] Petitioners did not allege any pendent state law claims against respondents Randall A. Terry, Project Life, or Operation Rescue. The state law claims alleged against other respondents are "tortious interference with prospective economic advantage" (Count V), "tortious interference with existing business relationship" (Count

Petitioners are the National Organization for Women, Inc., an advocacy organization opposed to any legal restrictions on human abortion, and two abortion businesses. Respondents are various individuals and organizations opposed to abortion, and a corporation that provides pathology testing services (Vital-Med Laboratories, Inc.). Petitioners allege that some of the respondents have conspired to close down abortion businesses[1] by unlawful conduct that amounts to violations of federal antitrust and racketeering laws.

Petitioners' lawsuit rests at its core on several erroneous propositions:

—that pro-life "rescue" sit-ins and protest activities constitute federal criminal extortion;

—that a series of such sit-ins amount to a violation of the federal racketeering statute; and,

—that concerted anti-abortion efforts, because aimed at closing abortion *businesses*, amount to a federal antitrust violation.

After nearly five years of discovery and repeated amendment of its complaint, petitioners remained unable to plead a valid cause of action under the governing federal statutes. The court of appeals correctly affirmed the judgment of the district court dismissing the petitioners' lawsuit. This Court should deny certiorari.

## STATEMENT OF CASE

### 1. *Statement of Facts*

The district court dismissed the petitioners' complaint. The record on appeal, then, consists of all facts properly pleaded *in the complaint*.[3]

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VI), and (against respondent Vital-Med) "breach of duty of confidentiality" (Count VII).

[3] Petitioners' recitation of the facts improperly includes numerous allegations from the RICO Case Statement that are not present

Petitioner National Organization for Women, Inc. (NOW) is an organization dedicated, *inter alia*, to preserving access to abortion. Second Amended Complaint (2d Am'd Cplt.) at 3-4, ¶ 5. Petitioners Delaware Women's Health Organization (DWHO) and Summit Women's Health Organization, Inc. (Summit) are commercial abortion businesses. *Id.* at 4-5, ¶¶ 6-8; *see also* Pet. at 6 (describing abortion businesses as "commercial establishments").

Respondents (aside from Vital-Med Laboratories, Inc.) consist of individuals and organizations, 2d Am'd Cplt. at 5-8, ¶¶ 9-15, 17-20, sharing a common goal of shutting down all abortion businesses in the United States, *id.* at 10, ¶ 26. These respondents are leaders and participants in the "activist anti-abortion movement." *Id.* at 17, ¶ 52; *id.* at 5 ¶ 9 (respondent Scheidler is "the director of defendant Pro-Life Action League, Inc."); *id.* at 5, ¶ 10 (respondent Ryan was "the director of defendant Pro-Life Direct Action League, Inc."); *id.* at 5, ¶ 11 (respondent Terry is "the national organizer of Operation Rescue"). Respondents have agreed to "drive . . . out of business" every abortion business in the country. *Id.* at 10, ¶ 26.

The methods these various respondents and other pro-life individuals employ to shut down abortion businesses include: distribution of a book "outlining methods intended to be used to interfere with and stop" abortion

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in the second amended complaint. In particular, petitioners recite a veritable nationwide laundry list of offenses that apparently includes every unlawful anti-abortion act known to petitioners. Pet. at 3 n.1. Petitioners' Second Amended Complaint (2d Am'd Cplt.), by contrast, lists only certain very specific incidents as the basis for petitioners' RICO claim. 2d Am'd Cplt. at 31-36, ¶¶ 98a-l. *See infra* pp. 15-17 (chart categorizing alleged predicate acts).

A RICO Case Statement may explain or focus allegations in a complaint; it cannot, however, substitute for an amended complaint under Rule 15(a), Fed. R. Civ. P., or otherwise make up for material deficiencies or omissions by adding to the factual allegations.

businesses from operating, *id.* at 10, ¶ 28 (Scheidler); training and encouraging other persons to use these techniques to close abortion businesses, *e.g.*, *id.* at 11, ¶¶ 29 (Scheidler), 33 (Ryan), 35 (Terry); organizing or participating in blockades and trespassing at abortion businesses, *e.g.*, *id.* at 20-21, ¶¶ 59-63 (various respondents and thousands of other unnamed participants); stealing fetal remains from respondent Vital-Med Laboratories, Inc., and then arranging "highly-publicized" funeral services and burials for these remains, *id.* at 22-25, ¶¶ 64-74 (Scheidler, Scholberg, Murphy, Migliorino, Wojnar, PLAL and other non-defendant participants);[4] damaging or destroying abortion business property (surgical supplies), *id.* at 14, ¶ 42 (non-defendant Joan Andrews); picketing, *id.* at 15-16, ¶¶ 48-50 (Scheidler and Ryan); and pressuring a landlord not to lease space to petitioner Summit, *id.* at 26, ¶¶ 77-78 (Migliorino).

Petitioners allege that one of the purposes of respondents' activities is to create a "threatening and intimidating atmosphere" at abortion businesses. *E.g.*, *id.* at 13, ¶ 39; *id.* at 19, ¶ 56.

Petitioners further allege that respondents receive income in the form of "contributions . . . in support" of their acts designed to shut down abortion businesses, *id.* at 37, ¶ 100, and that certain individual respondents receive salaries and benefits for their pro-life work, *id.*

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[4] Respondent Scheidler announced publicly in 1988 that the remains were "individually packaged and labelled . . . with the names of the mothers, doctors, dates and places" of the abortions. *Id.* at 24, ¶ 70. While this *fact* in itself "presented an obvious threat," i.e., possibility, that the mothers' names could be made public, *id.* at 25, ¶ 75, petitioners have not alleged that any of the respondents have revealed or "threatened" to reveal this information. Therefore petitioners' *legal* assertion that respondents "threatened to disclose confidential information about previous patients," *id.* at 35, 36, ¶¶ 98(j), 98(l) (Count II) (alleged predicate acts), finds no support in petitioners' *factual* allegations.

Petitioners have *not* alleged that respondents have received any income other than donations from their pro-life supporters (and salaries and benefits derived from these donations). Petitioners have *not* alleged that respondents have demanded, requested, or even suggested that petitioners or any other abortion businesses, staff, or clientele turn over money or other property either to respondents or to any other persons or organizations. Furthermore, petitioners have *not* alleged that any of the respondents have any financial or economic incentive for shutting down abortion businesses. Nor have petitioners alleged that respondents have any motivation for their actions other than a genuine, deeply held desire to stop the killing of unborn children by abortion.

**2. *Course of Proceedings***

Petitioners filed their original complaint on October 17, 1986. Petitioners subsequently filed, with leave of court, an amended complaint (on February 2, 1989) and a second amended complaint (on September 22, 1989). On March 18, 1991, petitioners submitted a RICO Case Statement in response to an order of the district court.

On May 28, 1991, the district court granted the motion of respondents Joseph Scheidler and others to dismiss the second amended complaint. *National Organization for Women v. Scheidler*, 765 F. Supp. 937 (N.D. Ill. 1991). The district court held that petitioners failed to state a claim, under the federal antitrust and racketeering laws, upon which relief could be granted. The district court accordingly declined to exercise pendent jurisdiction over the remaining state claims, and dismissed the case in its entirety.

The court of appeals affirmed the dismissal of petitioners' lawsuit. *NOW v. Scheidler*, 968 F.2d 612 (7th Cir. 1992), and subsequently denied rehearing and rehearing en banc, Pet. App. G-1.

## REASONS FOR DENYING THE WRIT

This brief focuses on the RICO claims at issue on appeal. Respondents Randall A. Terry, Project Life, and Operation Rescue adopt the arguments of respondents John P. Ryan and Pro-Life Direct Action League, Inc., and of Joseph Scheidler, et al., with respect to petitioners' antitrust claims. Petitioners have not alleged any pendent state claims against respondents Terry, Project Life, or Operation Rescue.

There are four main reasons for this Court to deny review of petitioners' RICO claims:

1. This case, because of petitioners' overblown and ultimately paranoid theory of litigation, does not present a suitable vehicle for the resolution of the question petitioners have posed.
2. There is no conflict in the circuits.
3. Review is unnecessary for the simple reason that the court below correctly resolved the question petitioners have posed.
4. Finally, resolution of the question petitioners have posed is not necessary to the disposition of this case, as a ready alternative ground exists for rejecting petitioners' RICO claims.

### I. PETITIONERS' UNSOUND AND SURREAL THEORY OF THE CASE DOES NOT MERIT REVIEW.

To state that the theory of petitioners' case borders on the absurd is to understate the situation. In essence, petitioners argue that the entire activist pro-life movement represents one huge, illegal conspiracy stretching across the country. *See* Pet. at 3, n.1; 2d Am'd Cplt. at ¶¶ 26-27, 49, 60-63.

Respondent Terry served interrogatories on petitioners seeking, *inter alia*, the names of persons having knowledge of the facts of the alleged antitrust and racketeering

conspiracies. In response, petitioners submitted a 68-page single-spaced list of names of "Persons Who May Have Knowledge of the Facts About Which the Interrogatories Inquire or Which Are Contained in Plaintiff's [sic] Answers Thereto," Ex. B to Plaintiffs' Responses to Terry's First Interrogatories to All Plaintiffs (July 16, 1990). (Excerpts of this document are included in the appendix to this brief.) Scattered among the hundreds and hundreds of names were the following:

> Blackmun, Harry
> Kennedy, Hon. Anthony
> Marshall, Hon. Thurgood
> O'Connor, Justice Sandra Day
> Powell, Hon. Lewis
> Rehnquist, Hon. William
> Scalia, Justice Antonin
> Stevens, Hon. John Paul
> White, Justice Byron

*See* Appendix. Presumably petitioners' assertions, if taken seriously, would require recusal of those Justices listed above who are currently Members of the Court. *See* 28 U.S.C. § 455(b)(1) (requiring disqualification of any justice who has "personal knowledge of disputed evidentiary facts concerning the proceeding").

The Justices whom petitioners identify as potential factual witnesses in this case enjoy diverse and illustrious company: also included on petitioners' list were various ministers (including "Kennedy, D. James Ph.D."), Roman Catholic bishops and cardinals, elected officials (including "Bond, Gov. Kit," "Bradley, Mayor Tom," "Dole, Sen. Bob," "Edwards, Rep. Don," "Helms, Sen. Jesse," "Kennedy, Ted," "O'Neill, Tip," and "Packwood, Sen. Bob"), judges, attorneys (including "Benshoof, Janet," "Bopp, Jame [sic]," and "Susman, Frank"), writers (including "Chapman, Stephen," and "Will, George F."), abortionists, and a huge miscellany of other individuals, from "Terry, Randy," to "Abzug, Bella," and from "Robertson,

The Rev. Pat" to "Tribe, Laurence." In petitioners' distorted, paranoid version of reality, the gigantic alleged conspiracy which petitioners face is apparently so huge as to be virtually common knowledge.

These outlandish delusions cannot be taken seriously. Nor do these fantasies merit the time of this Court. The judges sitting on the courts below have unanimously voted to reject petitioners' federal claims. There is no reason for this Court to resurrect this legal monstrosity.

## II. THERE IS NO CONFLICT IN THE CIRCUITS.

Petitioners portray the Seventh Circuit's decision in this case as creating a conflict with the Third Circuit, and an "inconsistency" with the Second and Eighth Circuits, over the question whether RICO applies when the defendants' activities involve neither economic crimes nor economic goals. A closer look at the authorities upon which petitioners rely, however, reveals that this "conflict" is nonexistent.

The circuits that have actually addressed the relevant issue—the Second and Eighth—are in harmony with the Seventh Circuit. First, in *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983), the Second Circuit held that RICO does not apply unless the defendants have at least some financial motivation—i.e., the defendants either engage in economic crimes (e.g., larceny) or pursue economic goals (i.e., seek revenue from their racketeering), *id.* at 58-65. Subsequent cases in the Second Circuit clarified that an economic goal need not be the sole or even predominant motive of the racketeering activity, *United States v. Bagaric*, 706 F.2d 42, 53, 55 (2d Cir.), *cert. denied*, 464 U.S. 840, 917 (1983), and that classic economic crimes like robbery fall within the RICO statute regardless of the defendants' ultimate noneconomic "revolutionary" purpose, *United States v. Ferguson*, 758 F.2d 843, 853 (2d Cir.), *cert. denied*, 474 U.S. 1032 (1985). But both

*Bagaric* and *Ferguson* applied the RICO statute as construed in *Ivic*; neither decision purported to read the economic purpose element out of the RICO statute.

The Eighth Circuit, meanwhile, has explicity concurred in the *Ivic* court's interpretation of RICO. *United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir.), *cert. denied*, 488 U.S. 974 (1988) ("For purposes of RICO, an enterprise must be directed toward an economic goal") (citing *Ivic* and an earlier Eighth Circuit opinion).[5]

Petitioners' failure even to mention either *Flynn* or *Ivic* in their petition to this Court is indefensible.

Petitioners' supposed conflict, then, reduces to the isolated Third Circuit ruling in *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989). But *McMonagle* merely held that *under the Hobbs Act* (prohibiting extortion) a defend-

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[5] Petitioners cite two pre-*Flynn* decisions which are irrelevant to the issue of economic purpose. In *United States v. Clark*, 646 F.2d 1259 (8th Cir. 1981), the court held that RICO applies to governmental bodies and added, in passing, that a RICO enterprise need not be "units of *economic* organization"—i.e., "organizations or structures which *exist* for the purpose of maintaining operations directed toward an economic goal." *Id.* at 1265 n.11 (second emphasis added; internal quotation marks and citations omitted). But this is no more than to say that the *raison d'etre* of an enterprise need not be to make money—a proposition wholly consistent with *Ivic* and *Bagaric*. The RICO statute requires only *some* economic purpose, as the Eighth Circuit subsequently reaffirmed in *Flynn*.

Petitioners' other Eighth Circuit case, *United States v. Ellison*, 793 F.2d 942 (8th Cir.), *cert. denied*, 479 U.S. 937 (1986), simply held that predicate acts of arson "were related to the affairs of the enterprise" (a white supremacist group) even though those acts provided "no direct financial benefit" to the enterprise. 793 F.2d at 950. The issue in *Ellison* was *not* the existence of at least *some* mercenary motive: the court had already observed that the supremacist group was involved in theft "intended to produce operating funds," *id.* at 945. The issue in *Ellison*, then, was only the "relatedness" of the predicate acts to the RICO enterprise, an issue inapposite to the case at bar.

ant need not receive a financial benefit from the alleged extortionate conduct (petitioners themselves described the holding of *McMonagle* in these terms in the court below, *see* Plaintiffs-Appellants' Brief at 37-38) and that the property rights extorted may be intangible. 868 F.2d at 1349-50. As the district court correctly recognized in the case at bar, 765 F. Supp. at 942-43, *McMonagle* simply did not address the question of an economic requirement for the "enterprise" element of RICO. Indeed, *McMonagle* did not even cite, much less discuss, the Second Circuit cases of *Ivic*, *Bagaric*, and *Ferguson*, or the Eighth Circuit's *Flynn*.

In sum, the Second, Seventh, and Eighth Circuits are all in agreement that the RICO statute requires some economic purpose. The Third Circuit has not yet addressed this specific issue. The alleged conflict petitioner has identified does not exist.

## III. THE COURT BELOW CORRECTLY DETERMINED THAT THE RICO STATUTE REQUIRES AT LEAST SOME ECONOMIC PURPOSE.

The RICO statute in 18 U.S.C. § 1962(c) forbids "any person employed by or associated with any *enterprise* engaged in, or the activities of which affect, interstate commerce, to conduct or participate . . . in the conduct of such *enterprise's* affairs through a pattern of racketeering activity . . ." (emphasis added). The court of appeals correctly rejected petitioners' claim under § 1962(c) for failure to allege facts showing any "enterprise" within the meaning of RICO: petitioners have alleged no economic purpose or profit-seeking activity whatsoever on the part of respondents.

RICO does not define the term "enterprise" explicitly. Instead, the statute merely provides that " 'enterprise' *includes* any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (emphasis added). By using the

term "includes" instead of "means," Congress clearly indicated that not *every* individual, partnership, and so forth qualifies *per se* as an enterprise. Indeed, the enterprise concept itself would be superfluous if every person, legal entity, or association in fact automatically qualified as an enterprise.

Other provisions of RICO make it clear that the term "enterprise" must mean an undertaking in which one can "invest" by acquiring an "interest" in or funding the "establishment or operation" of the enterprise. *See* 18 U.S.C. § 1962(a), (b). The plain implication of the text, then, is that an "enterprise" under RICO must, at a minimum, be engaged in or directed toward some *economic* undertaking.[6]

The Second Circuit thoroughly analyzed this question in *United States v. Ivic*, 700 F.2d 51, 58-65 (2d Cir. 1983), and concluded that RICO does not apply unless the defendants have at least some financial motivation.[7]

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[6] In analyzing the term "enterprise," this Court "must start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 238 (1989) (internal quotation marks and citations omitted). An "enterprise," according to Webster's Third New International Dictionary (1981), can *in the abstract* be any plan, design, or undertaking. *Id.* at 757. The first definition given for a *concrete* enterprise, however, is as follows: "a unit of economic organization or activity (as a factory, a farm, a mine); *esp*: a business organization: FIRM, COMPANY." *Id.* (definition 1(c)). This economic connotation also appears in such uses as "Acme Enterprises" or the term "enterpriser," i.e., an "entrepreneur," defined as "the organizer of an economic venture; *esp*: one who organizes, owns, manages, and assumes the risks of a business . . . ." *Id.* at 757 (definition of "enterpriser"), 759 (first definition of "entrepreneur").

[7] The Eighth Circuit has also recognized that a RICO enterprise requires at least some economic purpose. *United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir.) ("For purposes of RICO, an enterprise must be directed toward an economic goal"), *cert. denied*, 488 U.S. 974 (1988).

This economic motive need not be the sole, or even predominant motive, *United States v. Bagaric*, 706 F.2d 42, 53, 55 (2d Cir.), *cert. denied*, 464 U.S. 917 (1983); there need not even be a "*significant* economic purpose" for RICO to apply, *United States v. Ferguson*, 758 F.2d 843, 853 (2d Cir.) (emphasis in original), *cert. denied*, 474 U.S. 1023 (1985). But when neither the enterprise nor the predicate acts reveal "*any* financial purpose," RICO does not apply. *Ivic*, 700 F.2d at 65 (emphasis added).

The *Ivic* court gave several reasons for this conclusion. First, as discussed above, the text of §§ 1962(a) and (b) shows that "the term 'enterprise' quite clearly refers to the sort of entity in which funds can be invested and a property interest of some sort acquired, and hence the sort of entity which one joins to make money." 700 F.2d at 60. Thus, an "enterprise" "is evidently an organized profit-seeking venture." [8] Second, the title of the statute, "Racketeer Influenced and Corrupt Organizations," serves as an "aid in showing what was in the mind of the legislature," *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818). The terms "corrupt" and "racketeer" ordinarily would exclude "members of an organization striving for [a political or social goal] even by the most abhorrent means but without any desire for personal gain." *Ivic*, 700 F.2d at 61. The *Ivic* court likewise found support for its conclusion in the Congressional findings prefacing RICO, *id.* at 61-62, and the legislative history of RICO, *id.* at 62-64. Finally, the *Ivic* court observed that the RICO Guidelines of the Justice Department explicitly bar any indictment charging an "association in fact" as an enterprise " 'unless the association in

[8] The concept of "profit-seeking venture" is by no means limited to for-profit corporations. A non-profit corporation may charge for its services and pay a return to its investors. Governmental bodies may engage in bribery schemes. And even an unincorporated entity—a gang or robbers, for example—may seek a profit and provide a return to its "investors".

fact has an ascertainable structure which exists for the purpose of maintaining operations directed toward an *economic* goal . . .,' " *id.* at 64 (emphasis in *Ivic*) (quoting Guideline VI).

This statutory requirement of at least some financial purpose is not a judicially created obstacle to the proper functioning of RICO. Rather, as the Seventh Circuit recognized in this case, "this interpretation of § 1962(c) is dictated by the terms of the statute," 968 F.2d at 629, specifically the "enterprise" concept. The economic purpose element does no more than recognize a fundamental difference between those enterprises which engage in racketeering and corruption, even as a sidelight, *e.g.*, *United States v. Bagaric* (extorting payments from moderate Croatians as a means of furthering predominant nationalist political goals) from those movements which address exclusively political or social goals and, while breaking some laws, commit no "economic" crimes, *cf. NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (civil rights activism included violent incidents).

RICO prescribes no murky inquiry into "how much" economic motivation a defendant has. Rather, the economic purpose element posits a straightforward, bright-line test: Is there *any* mercenary purpose? The crucial distinction is between "some" and "none"—between something and nothing—and that is all the difference in the world.

The Seventh Circuit, after thoroughly analyzing the decisions of other courts of appeals on the question, concluded that "the use of the term enterprise in §§ 1962(a) and (b) conveys a restriction to economic entities," 968 F.2d at 629; therefore, an identical "interpretation of [the word 'enterprise' in] § 1962(c) is dictated by the terms of the statute." *Id.*

The court of appeals then applied the economic motive requirement to the facts of the case at bar and correctly concluded that petitioners' complaint failed to satisfy this statutory requisite. *Id.* at 630.

In the instant case, petitioners have alleged no economic purpose whatsoever on the part of respondents. At most, petitioners point to the facts that respondent organizations receive third-party donations to support their work and that some of the individual respondents receive salaries or in-kind benefits (e.g., use of a car) from these organizations. 2d Am'd Cplt. at 37, ¶ 100. As the Seventh Circuit held, "it is not reasonable to infer that the purpose of the [petitioners' alleged conduct] is to raise funds" simply because that conduct "results incidentally in donations to support it," *id.*

The fact that an organization is donor-sponsored, or that it pays its employees or agents, simply has no connection at all to the legality of its activities or its liability under RICO. The court of appeals therefore correctly held that petitioners failed to satisfy the economic purpose requirement of RICO.

## IV. AN ALTERNATIVE GROUND FULLY SUPPORTS THE JUDGMENT BELOW: THE ACTS ALLEGED DO NOT CONSTITUTE PREDICATE EXTORTION.

The Seventh Circuit rejected petitioners' RICO claim under 18 U.S.C. § 1962(c) for failure to allege facts sufficient to satisfy the economic purpose requirement of RICO. Petitioners urge this Court to construe RICO not to require *any* economic purpose whatsoever. Pet. at 12. But even if this Court were to do so, this would not help petitioners. The petitioners' complaint fails to state a RICO claim for an additional, wholly independent reason: a complete absence of the necessary "predicate acts." Thus, review of the "economic purpose" issue would be an advisory exercise.

Each subsection of the RICO statute requires proof of a "pattern of racketeering activity." 18 U.S.C. § 1962 (a), (b), (c). RICO specifies that a "pattern" of racketeering activity "requires at least two acts of racketeering activity," 18 U.S.C. § 1961(5). The necessary predicate acts of racketeering activity must in turn come within

RICO's definition of "racketeering activity," 18 U.S.C. § 1961(1), which lists the offenses that qualify as predicate acts. Thus, a RICO plaintiff must allege at least two "predicate acts" that fall within the RICO definition of "racketeering activity." Petitioners have failed to do so.

Petitioners rely exclusively upon allegations of "extortion" under the federal Hobbs Act, 18 U.S.C. § 1951. *See* 2d Am'd Cplt. at 31-36, ¶¶ 97-98; RICO Case Statement at 5. Hobbs Act violations do indeed constitute predicate acts under RICO. *See* 18 U.S.C. § 1961(1). The conduct petitioners alleged, however, does not make out even a *single* violation of the Hobbs Act, much less the minimum RICO requirement of *two* such acts.

The Hobbs Act, 18 U.S.C. § 1951, prohibits interference with commerce by "extortion," § 1951(a), and defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." § 1951(b)(2). Petitioners' complaint of predicate extortion under the Hobbs Act fails in four respects: 1) no allegation of "obtaining"; 2) no allegation of "property"; 3) no allegation of "consent"; and 4) no allegation of actual or threatened "force, violence, or fear."

The complaint specifies fifteen supposed predicate acts of extortion. *See* 2d Am'd Cplt. at 31-36, ¶ 98. The following chart lists the factual allegations corresponding to each alleged predicate act, and provides a brief description of the act in question. (Paragraphs refer to the Second Amended Complaint.)

| Allegation of predicate act | Corresponding factual allegation | Description of act | |
|---|---|---|---|
| | | Status | Substance |
| 1. ¶ 98a | ¶ 38 | Attempt, conspiracy, commission | rescue blockade [9] |

[9] A "rescue blockade" is a sit-in designed to prevent access to an abortion business. *See* 2d Am'd Cplt. at 12-13, ¶ 38; *id.* at 15, ¶ 47.

| Allegation of predicate act | | Corresponding factual allegation | Description of act | |
|---|---|---|---|---|
| | | | Status | Substance |
| 2. | 98b | 40 | Conspiracy | rescue blockades |
| 3. | 98c | 41 | Conspiracy | "unlawful, concerted action" |
| 4. | 98d | 42 | Attempt, commission | "stormed the clinic" and injured two persons |
| 5. | 98e | 42 | Commission | "stormed the clinic," "ransacked a medical procedures room," and destroyed surgical supplies |
| 6. | 98f | 47 | Attempt, conspiracy, commission | rescue blockade |
| 7. | 98g | 44 | Attempt | threat of "reprisals" should administrator of abortion business not quit job |
| 8. | 98h | 53 | Attempt, conspiracy, commission | rescue blockade |
| 9. | 98i(1) | 59, 63 | Attempt, conspiracy, commission | rescue blockades |
| 10. | 98i(2) | 60 | Attempt, conspiracy, commission | rescue blockades |
| 11. | 98i(3) | 61 | Attempt, conspiracy, commission | rescue blockades, trespass, and assaults upon police officers |

| Allegation of predicate act | Corresponding factual allegation | Description of act | |
|---|---|---|---|
| | | Status | Substance |
| 12. 98i(4) | 62 | Attempt, conspiracy, commission | rescue blockades |
| 13. 98j | 64-76 | Attempt, conspiracy, commission | theft and concealment of fetal remains; publicizing and conducting funerals and burials of stolen fetuses [10] |
| 14. 98k | 69-76 | Attempt, conspiracy | disclosure of identity of abortionists responsible for fetal remains; conducting and publicizing fetal funerals |
| 15. 98l | 64-76 | Attempt, conspiracy | theft, concealment, and transport of fetal remains; threat to disclose identity of abortionists; publicizing and conducting funeral Masses and burials for stolen fetuses [11] |

None of these alleged acts constitute federal criminal extortion.

[10] *See supra* note 4.

[11] *See supra* note 4.

**A. No Allegation of "Obtaining."**

A defendant may "obtain" property for purposes of the Hobbs Act in several ways. Most obviously, the extorter may personally receive a direct payment from the victim. *E.g., United States v. DeMet*, 486 F.2d 816 (7th Cir. 1973) (policeman extorting cash from merchant), *cert. denied*, 416 U.S. 969 (1974). The extorter may also "obtain" property for *another* person; no direct personal benefit to the extorter is necessary. *United States v. Green*, 350 U.S. 415 (1956) (extorting "wages" for employees performing unwanted, superfluous, or fictitious services).

In the case at bar, however, petitioners have alleged neither alternative. Petitioners have not alleged that respondents themselves either received or sought any benefit from any of the alleged victims of extortion. (The only "benefits" petitioners allege are donations and salaries which come, not from the alleged victims, but from independent sources.) Nor have petitioners alleged any attempt to coerce the transfer of any property to third parties.[12] Therefore respondents cannot, in any reasonable sense of the word, be guilty of "obtaining" any property.

**B. No Allegation of "Property."**

Petitioners identify the following supposed "property" extorted from the alleged victims: from employees, "jobs"; from doctors, the "economic right to practice medicine" at facilities that provide abortions; from patients, the "right to obtain services" at facilities that provide abortions; and from prospective patients, the "constitutional

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[12] Petitioners have alleged that certain "co-conspirators" themselves caused *damage* to the property of some abortion businesses. But vandalism alone—even intentional vandalism—is not extortion. Nor have petitioners themselves ventured so far as to allege that the property so damaged constitutes the property allegedly "obtained" by respondents. *See* 2d Am'd Cplt. at 31, ¶ 97 (describing "property" allegedly extorted).

right to decide whether and where to obtain medical services free from fear of violence or threatened or actual force." 2d Am'd Cplt. at 31, ¶ 97; RICO Case Statement at 5. These abstract "rights" of uncertain legal status do not constitute "property" for purposes of the Hobbs Act.

Any unlawful conduct, whether a tort, a breach of contract, or even a parking violation, will interfere to some degree with another person's "right" to do as he pleases. But if such "rights" constitute "property" under the Hobbs Act, then there are simply no limits whatsoever to the kind of injury necesary to rise to the level of federal criminal extortion.

This Court rejected a similar attempt to expand the concept of "property" beyond all meaning in the context of the federal mail fraud statute. *See McNally v. United States*, 483 U.S. 350 (1987). The mail fraud statute, 18 U.S.C. § 1341, prohibits use of the mails for "obtaining money or property" by fraud. 483 U.S. at 352 n.1. In *McNally*, the government charged the defendant with defrauding Kentucky citizens "of their right to have the Commonwealth's business and its affairs conducted honestly, impartially, free from corruption, bias, dishonesty, deceit, official misconduct, and fraud . . . ." *Id.* at 354 n.4 (trial court's instruction to jury). This Court recognized an obvious difference between "property rights" and "the intangible right of the citizenry to good government." *Id.* at 356. Indeed, this distinction was so clear that the Court considered that the only "arguable" way of saving the prosecution would be to construe the mail fraud statute so as to dispense entirely with "the money-or-property requirement" for certain kinds of fraudulent schemes. *Id.* at 358. Relying upon the rule of lenity, the Court rejected a construction that would render the property requirement meaningless: "The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear

and definite language." *Id.* at 359-60 (citations omitted). The Court refused to construe the mail fraud statute "in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials," and instead read the statute as "limited in scope to the protection of property rights." *Id.* at 360.

Acceptance of petitioners' strained characterization of abstract "rights" as property would likewise leave the boundaries of the Hobbs Act highly ambiguous and would put the federal government in the business of enforcing order in domestic social movements. Did the civil rights activists of the 1960's extort owners of diners of their "property right" to serve only the customers they chose? Employees of their "property right" to hold jobs in all-white establishments? White bus passengers of their "property right" to sit in the front of the bus? Such convoluted abstractions simply do not satisfy the "property requirement of the Hobbs Act.

**C. No Allegation of "Consent."**

The core of extortion is the inducement of voluntary—but coerced—action on the part of the victim. The Hobbs Act embodies this concept with its element of "consent" from the victim. Petitioners, however, have alleged no such extraction of consent.

Vandalism—even deliberate, serious property damage—is not the same as extortion. Nor are mere torts—even intentional torts—a form of extortion. This is because the consent of the victim is irrelevant to vandalism and intentional torts. The purpose of the vandal or tortfeasor is not to obtain permission for anything, but simply to inflict damage or injury.

In the case at bar, petitioners allege a conspiracy to shut down abortion businesses by unlawful conduct. But this is not extortion. Petitioners have not alleged that

respondents seek the *consent* of abortionists to blockade their facilities or publicly to display the remains of aborted babies.

Any unlawful activity exerts pressure on those who wish to avoid the consequences of that activity. But unless the Hobbs Act were construed to outlaw the universe of wrongful conduct, the deliberate seeking of some *consensual* conduct by the victim must remain a critical element of this statutory offense.

**D. No Allegation of "Force, Violence, or Fear."**

Conduct typical of civil disobedience—sit-ins, pickets, vehement rhetoric—does not constitute "force, violence, or fear" under the Hobbs Act. Petitioners have alleged no more than conduct of this sort;[13] hence, there can be no predicate extortion. *Accord Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 102 (2d Cir. 1990) ("it would be difficult to construe the [anti-abortion rescuers'] activities as described in the complaint, consisting of resistance to police efforts to clear protestors from the [abortion business] . . ., as the 'wrongful use of actual or threatened force, violence or fear' within the meaning of section 1951(b)").

In the case at bar, petitioners have sought to characterize a quintessentially social, moral, and political battle as "extortion." This semantic legal endeavor is flawed not only as a matter of statutory construction, but also as a

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[13] Arson and bombing would represent examples of force or violence; however, petitioners have alleged no such predicate acts. Petitioners have alleged a solitary incident of apparent assault by persons who are not defendants in this case. 2d Am'd Cplt. at 14, ¶ 42. But petitioners have alleged no connection to respondents that would support legal liability for this isolated incident. Liability of one person for the acts of another "certainly . . . cannot" rest upon a finding of an agency relationship "simply because both shared certain goals." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 925 n.69 (1982) (citation omitted).

fundamental matter of jurisprudence. As the sponsor of the Hobbs Act noted, the words "robbery" and "extortion" have been construed a thousand times by the courts. Everybody knows what they mean." 91 Cong. Rec. 11912 (1945) (quoted in *United States v. Culbert*, 435 U.S. 371, 378 (1978)). Petitioners' artificial and unbounded construction of the Hobbs Act, like the prosecutor's attempted expansive reading of that same Act in *McCormick v. United States*, 111 S. Ct. 1807, 1816 (1991), is "an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent . . . ."

For forty years after the passage of the Hobbs Act of 1948, not a single reported decision suggested that the pursuit of social, moral, or political goals through pressure tactics—including lawbreaking in the form of trespass, obstruction, mass picketing, and incidental scuffling —constitutes federal criminal extortion. The isolated and aberrant decision in *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989), cannot have singlehandedly revolutionized American jurisprudence.

Civil disobedience and social or political pressure tactics are "as American as apple pie," and characterizing ideological movements as extortionate simply because of the use of these traditional methods would move this country precisely in the direction of totalitarian oppression so recently abandoned in the former Soviet Union. The theory of petitioners' complaint would make a racketeer and an extortionist out of everyone from Mohandas Gandhi, to Martin Luther King, Jr., to the leaders of the Boston Tea Party. Petitioners' construction of RICO and the Hobbs Act would distort these statutes into weapons for combatting anti-nuclear protestors, animal rights activists, and opponents of apartheid. But as the Ninth Circuit declared in *United States v. Caldes*, 457 F.2d 74 (9th Cir. 1972) (cited with approval in *United States v.*

*Enmons*, 410 U.S. 396, 409 (1973)), "it appears to us that vandalism of the type committed by these [defendants] would be more properly and suitably prosecuted in the state courts and it is doubtful if Congress intended by Section 1951 to elevate this type of conduct to the level of the federal court." 457 F.2d at 79 (citing *United States v. Bass*, 404 U.S. 336 (1971)).

Seventeen years ago Judge (now Justice) Stevens observed for an en banc Seventh Circuit that the "extraordinary growth of federal criminal litigation poses a serious threat to the quality of federal justice; moreover, this growth may not only reflect but contribute to the continuing transfer of power from the several states to the national government." *United States v. Stasczuk*, 517 F.2d 53, 55 (7th Cir.) (en banc), *cert. denied*, 423 U.S. 837 (1975). Judge Stevens confirmed that "we have no desire to accelerate this trend unnecessarily," 517 F.2d at 55. This Court expressed the same caution in refusing to apply the Hobbs Act to unlawful conduct incident to a labor strike:

> First, this being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity. . . . Secondly, it would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States.

*United States v. Enmons*, 410 U.S. at 411 (citations omitted). These same principles govern the case at bar.

Petitioners have failed to allege facts that would constitute even a single predicate act of federal criminal extortion. Whereas the RICO statute requires at least

*two* or more such predicate acts, petitioners' complaint is fatally deficient. It follows that there is simply no occasion even to reach the "economic purpose" question on which petitioners seek review.

## CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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December 23, 1992

# APPENDIX

## APPENDIX

**Selected Excerpts of Ex. B to Plaintiffs' Responses to Terry's First Interrogatories to All Plaintiffs (July 16, 1990)**

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[page 6]

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[page 32]

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[page 40]

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[page 43]

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[page 46]

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[page 47]

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| Reynolds, Audrey | |
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| Reynolds, Hon. John | Wisconsin |
| Rhoden, Yalinda | Akron |

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[page 50]

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| Saylor, Kevin | |
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| Scanlan, Bishop John J. | Honolulu, HI |
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[page 57]

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[page 64]

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